BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RITA ROSE	)	
Claimant	)	
V.	)	
	)	
SEARS	)	Docket No. 1,075,426
Respondent	)	
AND	)	
	)	
TWIN CITY FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant, through Mitchell Rice, requests review of Administrative Law Judge Bruce Moore's December 11, 2015 preliminary hearing Order. John Graham appeared for respondent and insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the December 11, 2015 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

The judge found claimant failed to prove personal injury by accident arising out of and in the course of her employment on October 14, 2015.

Claimant appeals, but did not file a brief. Respondent requests the appeal be dismissed because claimant failed to file a brief setting forth the basis for review and the disputed issues. In the alternative, respondent maintains the Order should be affirmed.

The issues for review are: (1) should claimant's appeal be dismissed for failure to file a brief and (2) did claimant sustain personal injury by accident arising out of and in the course of her employment, including whether her asserted accident was the prevailing factor causing her injury?

FINDINGS OF FACT

Claimant, currently 63 years old, started working for respondent in March 2015, as a sales representative. She testified October 14, 2015, the day of her accident, was a windy day. She was returning to work after her lunch break. She testified she opened a main door to respondent's store, a door used by both employees and customers, but it was harder than usual to open and she felt a pop and immediate pain in her right shoulder. Claimant acknowledged the door is the same as any other single pane door that she has encountered elsewhere.

Claimant testified:

> A. I got it - - well, I got - - when it was all the way open, I felt the pain, you know. I started pulling on it, then I felt the pain.
>
> . . .
>
> Q. And while you're pulling this door towards you to open it, that's when you felt the pop?
>
> A. Yeah. But when the door is all the way open and the wind's blowing, that's when you feel the most force against the door.
>
> . . .
>
> Q. So, it's possible - - you talked about the wind but I want to make sure we're very clear. Did your shoulder pop while your hand was on the door and you were pulling it towards you; or did you open the door all the way, a gust of wind came and that blew the door, and that pulled you to the side?
>
> A. It wouldn't blow the door that way, it would blow it toward you, back shut. Because the wind comes whipping through the back alley this way and puts more pressure on the door, (indicating).
>
> Q. Okay. But just so we're clear. You actually injured your shoulder, you felt the pop while you were opening it, pulling it towards you; yes?
>
> A. I felt the pop when I opened the door.
>
> Q. Okay.
>
> A. I mean, I don't know if it was like right in the beginning, or it was just so much pain, it was just like I opened the door and then I felt pain.[1]

Following her accident, claimant clocked in and reported the incident to Christopher Tyree, the store manager, and to her supervisor. Claimant asked to go to a medical clinic, but respondent offered no treatment. Claimant went on her own to St. Rose Health Center, where a nurse wrote the following history:

> [P]atient states when she was coming back to work at [S]ears from lunch she opened the door to the building and felt a "pop" in her right shoulder and has had severe pain since then. [P]atient states she cannot lift her right arm and it hurts [to] wiggle [her] right fingers[.][2]

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[1] P.H. Trans. at 17-20.

[2] *Id*., Cl. Ex. 1 at 1.

Claimant was assessed with right shoulder rotator cuff impingement syndrome following an injury caused by pulling with sudden, strenuous movement, prescribed pain medication and taken off work pending an MRI. The MRI has not been authorized and claimant had not returned to work for respondent. Claimant returned to St. Rose on October 21 and November 11 and was respectively assessed with right rotator cuff arthropathy and right shoulder pain.

Mr. Tyree indicated after claimant reported her injury, he inspected the door and found nothing unusual or defective. No repair or corrective action was taken. Mr. Tyree had gone in and out of the door several times on October 14, 2015, and testified it opened normally. Mr. Tyree testified nobody else complained the door was difficult to open.

The judge's ruling states:

> Claimant's preliminary hearing requests are **CONSIDERED** and **DENIED**. Claimant has failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with Respondent. Claimant alleges injury to her right shoulder while pulling open a door to Respondent's premises. She acknowledges that there is nothing different about the door than any other door she might encounter when entering a business in the course of her daily activities. While she "thought" the door might have been more difficult to open on the day of her claimed accident, her supervisor checked the door and found it to be operating normally. No repair or corrective action was deemed necessary or taken. The court finds that merely opening a door, without more, is an activity of daily living. The court further finds that if the simple action of opening a door caused a suspected tear to the rotator cuff, the risk of injury was either a neutral risk or a risk personal to the claimant, and thus did not arise out of or in the course of her employment. **K.S.A. 44-508(f)(3)(A)(i) - (iii)**. Claimant has also failed to establish that the alleged accident was the "prevailing factor" in causing the injury, medical condition, need for treatment, disability or impairment. Given the relatively innocuous nature of Claimant's activities at the time she claims to have suffered her injury, more is needed than, "I opened the door before my should[er] hurt; ergo, opening the door hurt my shoulder." This is based on nothing more than *post hoc*, *ergo propter hoc* logic[.]

PRINCIPLES OF LAW

Claimant carries the burden of proving her right to an award of compensation based on the whole record using a "preponderance of the credible evidence" and a "more probably true than not true standard."[3] The phrases arising "out of" and "in the course of" employment are conjunctive and each condition must be proven before compensation is allowed.

[3] K.S.A. 2014 Supp. 44-501b(c) & K.S.A. 2014 Supp. 44-508(h).

K.S.A. 2014 Supp. 44-508 states, in part:

> (f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Inury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
>
> . . .
>
> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

Claimant's appeal is not dismissed for failure to file a brief.

Respondent requests claimant's appeal be dismissed because she failed to file a brief with the Board. The Board denies respondent's request for reasons set forth in *Salvador*:[4]

> Claimant failed to send a submission letter to the ALJ and to file a brief with the Board. K.A.R. 51-3-5 requires each party to send a submission letter to the ALJ before the ALJ issues a decision. However, there is no penalty if a submission letter is not sent. K.A.R. 51-3-5, in part, states:

[4] *Salvador v. Tyson Fresh Meats, Inc.*, No. 1,043,100, 2015 WL 996890 (Kan. WCAB Feb. 11, 2015).

> If there is a dispute between the employer and the worker as to the compensation due and hearings are held before the administrative law judge for a determination of the issues, upon completion of submission of its evidence, each party shall write to the administrative law judge a letter submitting the case for decision. The administrative law judge shall not stay a decision due to the absence of a submission letter filed in a timely manner. The submission letter shall contain a list of the evidence to be considered by the administrative law judge in arriving at a decision. . . .
>
> There is no statute requiring a party, on an appeal to the Board, to file a brief. . . .
>
> . . .
>
> K.A.R. 51-18-4(a) contains no provision allowing the Board to impose a penalty upon a party for failure to file a brief. Nor can the Board find a prior appellate court or Board decision wherein an appeal to the Board was dismissed for failure of a party to file a brief.

Claimant proved a compensable personal injury by accident arising out of and in the course of her employment.

Claimant testified it was windy when she returned from lunch to respondent's premises on October 14, 2015. She testified the wind was blowing against a door she pulled toward herself to open. Claimant was clear enough that she felt pain and a pop in her shoulder when opening the door. She was not guessing why she had pain. Claimant was injured while engaged in the work-related task of reentering the premises.

Claimant's testimony that she was injured while opening a door that was difficult to open due to the wind is credible. While the store manager testified he opened and shut the door in question more than once on October 14, 2015, and found it to be operating normally, he provided no testimony regarding the presence or absence of wind that, according to claimant, made opening the door more difficult.

Granted, opening a door is a commonplace event and seemingly innocuous. However, the impact of the wind did in fact make this simple task difficult, and in this case, injurious. There is no actual evidence claimant's injury was due to a personal risk or a neutral risk with no employment character. Opening a door that is being blown shut, in order to get into your employer's rented building, is not an activity of day-to-day living. The context of what claimant was doing – opening the door – is compensable as connected to or inherent in performing her job.[5]

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[5] See *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 140, 343 P.3d 114 (2015).

What is the prevailing factor in causing an injury is based on all relevant evidence. Claimant need not produce medical evidence. Under this record, claimant's testimony that she injured her shoulder opening the door with gusting winds is sufficient proof of the prevailing factor requirement.

CONCLUSIONS

Claimant's appeal is not dismissed for failure to file a brief. Claimant sustained personal injury by accident arising out of and in the course of her employment. She proved the prevailing factor requirement.

WHEREFORE, the undersigned Board Member reverses the December 11, 2015 Order and remands for consideration of claimant's requests.[6]

IT IS SO ORDERED.

Dated this _____ day of January, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Bruce Moore

[6] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.